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No. 88-810

In The

Supreme Court of the United States

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA,
Petitioner,

v.

DONALD R. PARKER, *et ux.*,
Respondents.

Reply to Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

FREDERICK D. COOKE, JR.
Corporation Counsel, D.C.

*CHARLES L. REISCHEL,
Deputy Corporation Counsel, D.C.
Appellate Division

DONNA M. MURASKY,
Assistant Corporation Counsel, D.C.

Attorneys for Petitioner
Room 305, District Building
1350 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

**Counsel of Record*

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Room 305, District Building
1350 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

**Counsel of Record*

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I. The *Garner* Instruction Should Have Been Given.

The Opposition's argument that the *Garner* instruction was properly denied ignores why that instruction was requested; what the actual instruction requested was; and what the impact of *Garner* is for cases like this one. That approach should not be permitted to obscure the fact that without the *Garner* instruction, the jury was permitted to find the District liable simply because, as allowed by District policy, a police officer, who feared imminent death, shot a suspected felon without actually seeing a gun in that suspect's hand.

As the Opposition concedes (Opp. at 15), the constitutional tort *claimed* in this case is that Officer Hayes used unreasonable force when he shot Parker. Admittedly, however, Officer Hayes testified that he shot Parker when it appeared that Parker was reaching for a gun. He shot because he believed that his own life and that of an innocent motorist were threatened and to prevent Parker from renewing his efforts to steal that motorist's automobile with the motorist inside. The District was entitled to have its view of the facts fairly evaluated by the jury.

At trial and on appeal, the District urged that *Tennessee v. Garner*, 471 U.S. 1 (1985), provided substantial guidance in resolving Parker's constitutional claim. In the District's view, *Garner* stands for the fundamental proposition that a police officer may use deadly force when he reasonably believes that a suspect poses a threat of serious physical harm to himself or to others or when he reasonably believes that deadly force is necessary to apprehend a suspect if he has probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm and, if, where feasible, a warning has been given.

By contrast, Parker urged that the particular factual context of *Garner*—a suspect actually in flight at the precise moment he was shot—is a limitation on when police officers may use deadly force. In addition, Parker urged that the

District's deadly force policy was flawed because it did not require that a police officer see a weapon before shooting and that Officer Hayes acted unreasonably because he fired without having seen a weapon in Parker's hand.

Evidence was introduced on both theories. Parker called Officer Hayes as his very first witness and established a major, if not the major, theme of his trial—that a police officer may not reasonably shoot a suspected felon until and unless he sees a weapon in the hands of his adversary. In response to questions from Parker's counsel of record in this Court, Officer Hayes testified:

> Q. Did it occur to you, Officer Hayes, to wait to see whether or not Mr. Parker had a weapon before you fired the first round?
>
> A. Mr. Taylor, I was in fear of my life. I wasn't going to sit around and see a smoking gun explode in my face and sustain a fatal wound or a potentially fatal wound before I determined that I was going to shoot. I had to make my decision at the time that I felt that I was in danger.
>
> Q. Did you consider whether or not you might wait to see whether he had a gun before you fired?
>
> A. As I just explained, sir, I wouldn't consider that, because I could have been injured and the lady kidnapped and injured by the time I waited to see a smoking gun explode in my face. [T. 205].

Having established that Officer Hayes did not see a weapon, Parker brought on his expert witnesses. In the opinion of Roy C. McLaren, whether a weapon has been seen was dispositive of both the unreasonableness of the District's deadly force policy and of Officer Hayes' action:

> Q. What does a reasonably careful and prudent training program train an officer to do with regard to the use of force when he suspects but does not see a weapon?
>
> A. To use other means of force necessary to control, but only that amount of force necessary to control or to make an arrest, and certainly short of deadly force if there is no gun apparent.

> Q. Is it reasonable, in your opinion, to fire when the officer could not see a gun in Mr. Parker's hands?
>
> A. No. [T. 691-92].

Later on, McLaren reiterated: "You must see a gun in order to make sure that there is an actual threat to yourself or someone else." [T. 726].

The District unsuccessfully moved for a directed verdict. In doing so, the District urged that *Garner* permitted Officer Hayes to shoot because he believed that his life was in imminent danger and because "kidnapping is a serious crime which was taking place in front of Officer Hayes . . .." [T. 1474]. The District added:

> . . . We would submit that Officer Hayes wasn't even shooting for the purpose of preventing an escape. Officer Hayes was acting for the purpose of protecting himself and Ms. Rainford and that that is an even greater justification than that provided by the Court in . . .Garner.
>
> * * *
>
> . . . There was no intention on the part of the police officers to shoot Mr. Parker as a fleeing felon at any time. Officer Motley never shot him while he was running through the woods. They were trying to use the least amount of force necessary. [T. 1474, 1488-89].

The legality of the District's deadly force policy and of Officer Hayes' decision to shoot without having seen a gun was also a focal point of the closing arguments to the jury. Thus, counsel for Parker urged:

> . . . I say to you, Ladies and Gentlemen, that background information never justifies a police officer in shooting his weapon at a man *when he does not know that he's armed.* It could be Jack the Ripper standing there, . . . the worst criminal that has ever come down the pike, *and if that officer doesn't know that he's armed* and doesn't have reasonable grounds to believe that he's going to take some action against him, he may not shoot.
>
> * * *
>
> . . . No, you shouldn't forget about the fact that Don Parker had a criminal record. But that doesn't

> justify an officer shooting anybody *when he doesn't know that that person has a gun and is about to use it. Those two things.* Officers arrest people with guns all the time. You heard Officer Hayes testify to that effect. Officers arrest people with guns in their hands. But *until the officer knows he's armed and sees that the gun is headed in his direction or in the direction of an innocent person,* he is not justified in firing his gun and attempting to kill the person that he's shooting at. [T. 2103-04 (Emphasis added.)].

On the next morning, the District asked the court to give one paragraph of its proposed *Garner* instruction:

> . . . [I]t is constitutional for a police officer to use deadly force in apprehending a suspect, if he has probable cause, that is a reasonable belief that the suspect poses a threat of serious physical harm either to the officer or to others. It is also constitutional for an officer to use deadly force in *apprehending* a suspect, if there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, if, where feasible, some warning has been given. [Emphasis added.]

The District made its request "in particular light of counsel's arguments yesterday giving an erroneous statement of the law to the jury with regard to . . . Garner." [T. 2196]. In view of that, the District also urged that "the language [in the proposed instructions] is too vague as to what in fact the constitutional violation is." [T. 2196].

The trial court refused to give the instruction.

The Opposition addresses only the second sentence of the instruction, and thus implicitly concedes that the first should have been given. That concession is correct. *Garner* cannot stand for the proposition that a police officer may shoot a suspected felon if, and only if, that suspected felon is actually running away, rather than momentarily pausing, when he appears to be reaching for a weapon. *See Sherrod v. Berry,* 856 F.2d 802, 805 (7th Cir. 1988) (*en banc*).

The second sentence in the proposed instruction was also proper in view of *Garner,* the evidence, Parker's closing

arguments, and the rest of the jury instructions. Thus, Parker is wrong in suggesting that the second sentence of "the instruction would have incorrectly told the jury that Hayes was justified in shooting Parker merely because he was suspected of a crime of violence regardless of whether Hayes' use of force was necessary to protect his own life or that of another." Opp. at 19. The instruction would have told the jury that Officer Hayes was permitted to shoot Parker in order to apprehend, or stop, Parker if he also had probable cause to believe that Parker had committed a crime involving the infliction or threatened infliction of serious physical harm. The evidence demonstrated that Officer Hayes had never suggested that he shot Parker merely because he was wanted for armed robbery; and, indeed, during the chase, neither Officer Hayes nor his partner fired a shot. The evidence also demonstrated that, at the time he fired, Officer Hayes was confronted by a person who had just attempted to kidnap an innocent passerby and who appeared to be armed; that Officer Hayes had momentarily thwarted those efforts but had been unable to subdue Parker physically; and that Parker was adjacent to the open door of the automobile, with its motor running (and with the innocent passerby still inside). Officer Hayes testified that he believed that deadly force was necessary at the moment he shot in order to stop, arrest, or apprehend Parker. As a result, the instruction could not reasonably have been interpreted by the jury as permitting Officer Hayes to shoot Parker simply because he was a felony suspect.

In short, the law, as set forth in *Garner,* and the evidence fully supported the District's request for both parts of the instruction. Furthermore, the need for all or part of this instruction was critical in view of the repeated emphasis by Parker's expert and his counsel that Officer Hayes had acted improperly because he had not seen a weapon before he shot, and that the District's policy was flawed because it does not forbid police officers from using deadly force unless they actually see a weapon.

The fact that the jury was given the standard instruction for evaluating expert testimony did not cure this error because the jury was not informed of the constitutional stan-

dard by which it should have measured the conflicting expert testimony (and evaluated the closing argument by Parker's counsel). As a result, the instructions given permitted liability to be imposed on a constitutionally untenable theory, and reversal is required. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 821-22 (1985) (plurality op.); *id.* at 830-33 (Brennan, J., concurring).

II. There Is A Square Legal Conflict In The Circuits Over Whether a Formal Objection To Jury Instructions Must Always Be Made Immediately Before The Jury Retires.

As a leading scholarly treatise has recognized (Pet. at 22), and as Parker implicitly concedes, there is a conflict among the Circuits over whether a formal objection to jury instructions must be made in any and all circumstances. Parker's only opposition to this Court's review of this issue is that it is fact-bound. He does not contend that the trial judge in this case was not fully and fairly apprised of what the District wanted before the jury retired to deliberate; nor does he deny that the trial judge, after closing arguments but before the jury was instructed, issued a final ruling that the proposed *Garner* instruction should not be given and directed counsel to raise only new objections to the instructions after they were given.[1] *See* Opp. at 23-26.

The issue whether an objection amounting to a mere formality must be made, over a trial court's express directive to raise only new objections, is in no way fact-bound. Furthermore, the new cases cited by the Opposition support the District's argument that the panel majority erred in ruling that the District had failed to comply with Fed. R. Civ. P. 51.[2]

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[1] The Opposition is wrong in suggesting (Opp. at 24) that the *Garner* jury instruction issue was not properly raised *on appeal*. Rather than recite to this Court the details of the District's *Garner* arguments on appeal, it is enough to say that the majority, which *sua sponte* managed to find a Rule 51 problem, nowhere suggested that the *Garner* jury instruction had not been properly raised by the District on appeal. Indeed, as Parker admits (Opp. at 2), the majority rejected on the merits the District's argument that the instruction should have been given.

[2] In three of the cases, the complaining party not only failed to object to the jury instructions as given but also failed to alert the trial court in any meaningful way of a claim of error. *See Spanish Action Committee of Chicago v. Chicago*, 766 F.2d 315, 318-19 (7th Cir. 1985); *United*

[Footnote continued on next page]

III. This Petition Presents Important Issues Concerning The Proper Interpretation of *Monell*.

At trial, Parker vigorously attacked the District because it imposed no requirement that police officers actually see a weapon before they may use deadly force. This requirement is not mandated by the Constitution, and the evidence was uncontradicted that the District's deadly force policy complied with the Constitution; that the District rigorously communicated its policy to its police officers; and that Officer Hayes understood this policy.

Accordingly, as both the lower courts recognized, this case presents an important legal issue: Can the District, although it has rigorously implemented a constitutional deadly force policy be held responsible under *Monell* for Parker's injuries assuming, *arguendo,* that it inadequately trained its officers in extrajurisdictional arrest authority and/or in hand-to-hand combat? Put another way, in a case claiming that a police officer's use of deadly force was excessive, does *Monell* bar liability against a municipality which has adopted and implemented a constitutional deadly force policy?

Depending on the resolution of that fundamental legal issue, the Petition also sets forth two other principal reasons

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[Footnote continued from previous page]
States v. Heyward-Robinson Co., 430 F.2d 1077, 1083-85 (2d Cir. 1970),*cert. denied*, 400 U.S. 1021 (1971); *Klapmeier v. Telecheck International, Inc.*, 482 F.2d 247, 255 (8th Cir. 1973). In *Heyward-Robinson*, moreover, the court distinguished a case in which a claimed error was in no way brought to the trial court's attention from a case "where counsel had made his position abundantly clear and the trial court had made it plain that further efforts on his part to except or object would be unavailing and had warned him not to take exceptions." 430 F.2d at 1084. In *Fischer v. Dallas Federal Savings and Loan Ass'n*, 835 F.2d 567, 569 (5th Cir. 1988), the court merely ruled that a request for an instruction *before* trial is, itself, insufficient to preserve for review a failure to give an instruction when the trial court gave the parties "ample opportunity to object to the proposed charge" and counsel had failed to object to the omission of the jury instruction. Finally, in *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340 (6th Cir. 1985), the court, following *Dunn v. St. Louis-San Francisco Ry*, 370 F.2d 681 (10th Cir. 1966), ruled that a party, who indicated only that he had a problem with a proposed jury charge in a precharge conference but failed to object when the court expressly invited counsel to do so after the charge was given, had failed to preserve the claimed error for review. At the same time, the court recognized that where an exception after a charge would be a mere formality, an exception need not be taken to preserve the error for review.

why the District may not, consistently with *Monell*, be held responsible for Parker's injuries; namely, that *Monell's* "moving force" requirement means much more than "but for" causation, and that "deliberate indifference" means much more than mere inadequacy.

For example, any inadequate training on extrajurisdictional arrest authority cannot be deemed the "moving force" of Parker's injuries. The court of appeals' decision to the contrary squarely conflicts with *Cameron v. Pontiac, Michigan*, 813 F.2d 782 (6th Cir. 1987), as implicitly conceded by the Opposition, which fails to address *Cameron*. Furthermore, any such inadequate training cannot be deemed deliberately indifferent to life for two independent reasons. One, training in extrajurisdictional arrest authority does not even deal with the circumstances in which a police officer may use deadly force, the constitutional tort asserted by Parker. Second, even if an *utter absence* of such training could conceivably cause a police officer to shoot in circumstances in which the Constitution says he may not, the record here demonstrates that training in extrajurisdictional arrest authority was given and that the District rigorously instructed its police officers to secure local assistance whenever they reasonably expected to effect an extrajurisdictional arrest.

As another example, any alleged failure to train MPD officers in hand-to-hand combat was neither the moving force behind Parker's injuries nor deliberately indifferent to the unlawful use of deadly force. Assuming, *arguendo*, that Officer Hayes received only one hour of training in hand-to-hand combat, and that Officer Hayes would have been able to subdue Parker during the initial confrontation in the passerby's automobile, had he been given more rigorous training in hand-to-hand combat, any lack of training had, at best, only a "but for" connection with Parker's injuries. This level of causation is insufficient. Furthermore, this Court has never held that the Constitution requires that police officers be trained in hand-to-hand combat, or that any lack of training in

hand-to-hand combat may be said to be deliberately indifferent to the use of unlawful deadly force.[3]

This case is, therefore, an appropriate vehicle to illuminate the meaning of *Monell* in the important context of law enforcement. Juries throughout the country are being instructed in the language of "deliberate indifference" and "moving force." However, this Court has yet to explain, as a practical matter, what this language means. In addition, as this Court knows from its own docket, *Monell* cases charging inadequate supervision, training, and discipline are proliferating and becoming increasingly expansive—to the point where every facet of a municipality's operations is being subjected to microscopic scrutiny to determine whether it is "inadequate" in some respect. As a result, this Court is not likely to get a case that provides the factual record necessary to make an informed judgment about what the Constitution requires and, at the same time, is not "fact-bound" in some respects.

Finally, this is a case that cries out for review. Here, a jury expressly found that Officer Hayes did not use excessive or unreasonable force in shooting a person who was wanted on an armed robbery charge; who was in the process of attempting to kidnap an innocent motorist; and who responded to Officer Hayes' command to freeze by verbally threatening him and reaching for his waistband. The same jury nevertheless found that the District somehow had violated Parker's due process rights, in a case in which Parker con-

[3] In their efforts to persuade this Court to deny review, counsel for the Parkers have seriously misstated the evidence presented on the issue of training in methods of subduing suspects. *Compare* Opp. at 9-12 with Pet. App. at 37a-39a (Williams, J., dissenting). The evidence was that the MPD continuously provided training to its officers, including the holds and other tactics mentioned by Parker's experts. The evidence also demonstrated, however, that the MPD recognizes that it cannot predict every set of circumstances in which a police officer may find himself; that each and every police officer may have to make a split-second decision with no opportunity to consult superiors; and that a police officer, in those circumstances, must exercise judgment based on his training and experience. As a result, the training given the experienced police officers who were selected for the Repeat Offender Project does not deserve the epithets—"live by your wits ethic," "ad libbing" and "freelancing."

tended that the District should have taught its police officers not to shoot until they see a weapon in the hands of an adversary and that the District had inadequately trained its police officers about extrajurisdictional arrest authority and hand-to-hand combat.

When all is said and done, the principle for which the majority opinion stands is that a municipality may be held liable whenever flaws, or presumed flaws, in training policies helped to create a confusing situation that preceded a police officer's use of deadly force in *circumstances permitted by the Constitution,* but hindsight reveals that the use of such force was not necessary. Such a principle surely deserves Supreme Court review.[4]

CONCLUSION

This Court should grant the petition.

FREDERICK D. COOKE, JR.
Corporation Counsel, D.C.

*CHARLES L. REISCHEL,
Deputy Corporation Counsel, D.C.
Appellate Division

DONNA M. MURASKY,
Assistant Corporation Counsel, D.C.

Attorneys for Petitioner
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**Counsel of Record*

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[4] Although the District has raised a number of issues in its Petition this Court need not necessarily reach all of them. Thus, for example, if this Court should agree with the District's contentions on the scope of *Monell,* it need not decide the *Garner* and Rule 51 issues. On the other hand, this Court could, summarily, the District believes, reverse the court of appeals on the *Garner* and Rule 51 issues. If the Court should do so, the District, at the very least, would entitled to a new trial on the 42 U.S.C. § 1983 claim (presumably limited to the issue of liability).